

REMARKS

After the foregoing Amendment, claims 1, 3, and 5-28. are pending in this application. Claims 6, 8, 11-13 and 15-25 were withdrawn from consideration. Claims 2 and 4 were previously cancelled without prejudice. This Reply amends claim 1, and adds paragraphs [0006a] and [0006b] to the specification. These amendments introduce no new matter into the application.

Claim Rejections - 35 USC § 112

The Action rejects claims 1, 3, 5, 7, 9, 10, 14, and 26-38 under 35 USC § 112, as indefinite with respect to the recitation "balancing muscle and mind function." Claim 1 has been amended to instead recite "a composition that improves muscle and mind function." Additionally, the specification has been amended to define the terms "muscle function" and "mind function," based on the description provided in the originally filed specification. A person of ordinary skill in the art would recognize the factors listed in the definitions as pertaining to muscle and mind function, and would further understand how these factors are measured, and improved.

Accordingly, withdrawal of the claim rejection under 35 USC § 112 is respectfully requested.

Claim Rejections - 35 USC § 103

The Action rejects claims 1, 3, 5, 7, 9, 10, 14, and 26-28 as obvious under 35 USC § 103(a) over Krotzer (WO 99/61038) in view of Thomas (US 5,972,985). Applicant respectfully traverses this rejection.

Claim 1, as amended, recites a “drink composition that improves muscle and mind function, acts as a relaxant, and counterbalances the effects of adrenaline.” Neither of the cited references teach or suggest these limitations.

The Action maintains that it would be obvious to combine the cited references to achieve a composition as claimed. Applicant respectfully disagrees, and in further support of the patentability of the claimed composition, submits the attached declaration of inventor Pertti Lähteenmäki pursuant to 37 CFR § 1.132 ("Declaration"). Evidence of Mr. Lähteenmäki's status as a person of ordinary skill in the art is provided in the Declaration at ¶ 2-3, as well as the attached Exhibit C. Presentation: "Flow Drinks Presentation 080409," p. 25-32.

The Declaration shows that a person of ordinary skill in the art would not look to Krotzer or Thomas in developing a composition such as that recited in the claims, and would actually regard Krotzer as teaching away from such a composition. The Declaration further demonstrates the existence of secondary considerations, including unexpected results and commercial success of the claimed composition.

A person of ordinary skill in the art would not look to Krotzer or Thomas to develop a "composition that improves muscle and mind function," as recited in claim 1. In maintaining the claim rejections, the Action states that "Thomas is concerned with exerting an effect on the brain. This function overlaps with applicant's claimed intended use of producing effects on the brain such as relaxation and 'balancing mind function.'" However, as demonstrated by the Declaration, this overlap is not sufficient to render the references within the realm of analogous art, and a distinction between the two fields of endeavor exists from the perspective of a person of ordinary skill in the art. See Declaration ¶ 11-12.

Thomas's disclosure is directed to compositions containing antioxidants to prevent cell damage. See col. 1, lines 6-49. In contrast, Applicant's composition, instead of preventing negative effects from taking place, initiates positive effects in the muscles and mind, improving function thereof by acting as a relaxant, and counterbalancing the effects of adrenaline. Evidence of these effects is provided in the Declaration, as well as the attached Exhibit A, relevant portions of which have been provided translated into English, which explain that, contrary to expectation of those skilled in the art, the composition causes recipients to maintain reduced heart rates over extended time periods. See Declaration at ¶ 14-16, and Exhibit A, Pro Gradu Master's Thesis, Harriet Hägglund, University of Helsinki, Division of Nutrition, November 2008.

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With respect to Krotzer, not only would a person of ordinary skill in the art have no motivation to look to this reference, but would further have no basis for selecting the specific ingredients recited in Applicant's claims. As the Declaration points out, Krotzer's Table A includes over sixty ingredients, only five of which are recited in the claims. No motivation exists to select these five specific ingredients, and no motivation exists to combine them with conifer bark extract or grapeseed extract. Such a composition could only be reached by engaging in undue experimentation. See Declaration ¶ 7-9.

The Action dated September 29, 2007, states that "absent some demonstration of unexpected results from the claimed parameters, this optimization of ingredient amount would have been obvious at the time of applicant's invention." Page 6. The Declaration demonstrates that the claimed combination does in fact achieve unexpected results. Namely, a composition containing guarana would be expected to act as a stimulant, increasing heart rate. Guarana would not be selected by a person of ordinary skill in the art for a composition that "acts as a relaxant, and counterbalances the effects of adrenaline." See Declaration ¶ 16. Krotzer even describes Guarana as a "stimulant," (See Table A at page 15) and thus teaches away from its inclusion in a composition that "acts as a relaxant, and counterbalances the effects of adrenaline." Finally, due to the unexpected results achieved with the claimed combination of ingredients, "glucose, fructose, guarana, taurine, and at

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least one extract comprising flavonoids in physiologically active amounts selected from the group consisting of conifer bark extract and grapeseed extract," as recited in claim 1, the product has been met with a great deal of commercial success in the marketplace. See Declaration at ¶ 17; Exhibit B, Presentation: "Investment Opportunity VC and Private Investors," at p. 30, 32-33; and Exhibit C at p. 15, 17. These unexpected results and the commercial success evidence the patentability of the claimed composition.

Based on the foregoing, Applicant believes that the rejections under 35 USC § 103 are overcome and respectfully requests withdrawal of the same.

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Conclusion

If the Examiner believes that any matters need to be addressed in order to place this application in condition for allowance, or that a telephone interview will help to advance the prosecution of this application, the Examiner is invited to contact the undersigned by telephone at the Examiner's convenience.

In view of the foregoing, Applicant respectfully submits that the present application, including claims 1, 3, 5, 7, 9, 10, 14, and 26-28, is in condition for allowance and a notice to that effect is respectfully requested.

Respectfully submitted,

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Enclosure